IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF CALIFORNIA

MELVIN ALLEN WOOD,

Petitioner,

v.

DERRAL G. ADAMS,

Respondent.

CIV-S-01-1558 DFL PAN P

MEMORANDUM OF OPINION AND ORDER

Petitioner, a state prisoner proceeding pro se, has filed an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging two separate state court convictions: (1) his April 10, 1998 conviction for stalking under Cal. Penal Code § 646(b); and (2) his March 31, 1998 conviction under Cal. Penal Code § 288(c) for a lewd act upon a child. Respondent filed an answer on October 21, 2002. The petition was taken under submission on December 5, 2002, after the court denied petitioner's request for an extension of time to file his traverse.

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Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to or an unreasonable application of clearly established federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). The "contrary to" clause applies when a state court applies a rule different from the governing law set forth in the Supreme Court's cases, while the "unreasonable application" clause applies if the state court correctly identifies the governing legal principle from the Supreme Court's cases, but unreasonably applies it to the facts of the particular case. Bell v. Cone, 535 U.S. 685, 694, 122 S.Ct. 1843 (2002). The petitioner has the burden to show that the state court's decision was either contrary to or an unreasonable application of state law. Woodford v. Visciotti, 537 U.S. 19, 25, 123 S.Ct. 357 (2002). It is appropriate to look to lower federal court decisions to determine what law has been "clearly established" by the Supreme Court and the reasonableness of a particular application of that law. See Duhaime v. Ducharme, 200 F.3d 597, 598 (9th Cir. 2000). The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila

v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002). In determining whether the state court decision is entitled to deference, it is not necessary that the state court cite the controlling federal authorities, so long as neither the reasoning nor the result of the state court decision is contrary to federal law. Early v. Packer, 537 U.S. 3, 8, 123 S.Ct. 362 (2002).

A. Stalking Conviction

Petitioner's October 21, 2002 conviction for stalking was based on repeated violations of a restraining order obtained by his wife Penny. (Answer at 5-7.) The restraining order was in effect beginning August 1, 1997. (Id.) The testimony at trial indicated that, between August and October 1997, petitioner violated the restraining order on at five occasions. (Id.) For this conduct, petitioner was convicted under Cal. Penal Code § 646(b).

Petitioner makes two claims as to this conviction: (1) that the trial judge erred in denying his request for a continuance; and (2) that the reasonable doubt instruction given provided insufficient guidance to the jury on the degree of certainty required to convict. (Pet. at 6, 6E.)

Petitioner sought a continuance to obtain the testimony of Officer Locatelly, who prepared a computer-aided dispatch report which indicated that Penny had encouraged petitioner to violate the restraining order on one occasion. (Court of Appeal Decision "Ct. App." at 8-10.) After hearing from both sides, the trial court denied the request, stating that it did not appear that

Locatelly's testimony would add "any additional evidence which would either lay a foundation or provide any exception to the court's ruling." (Id. at 10.)

To state a due process claim based on the denial of a continuance, the petitioner must show that the denial was an abuse of discretion, considering such factors as: (1) the degree of diligence of the party requesting the continuance; (2) whether the continuance would have served a useful purpose; (3) the inconvenience to the court and the prosecution of granting the continuance; and (4) the prejudice suffered from the denial. Armant v. Marquez, 772 F.2d 552, 556-57 (9th Cir. 1985).

While the California Court of Appeal did not mention or apply Armant in rejecting this claim, its reasoning and its decision are consistent with federal law. The court of appeal evaluated petitioner's diligence, as well examining the probative value and admissibility of the evidence sought. (Ct. App. at 10-11.) The court of appeal's decision was not contrary to or an unreasonable application of state law. This claim is DENIED.

Petitioner also challenges the reasonable doubt instruction, CALJIC 2.90, which defined reasonable doubt as doubt that "leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction in the truth of the charge." (Pet. at 6E.) In general, a challenge to jury instructions does not state a federal constitutional claim. Engle v. Issac, 456 U.S. 107, 119-123, 102 S.Ct. 1558 (1982). To warrant federal habeas relief, the challenged jury instruction "cannot be merely

'undesirable, erroneous, or even universally condemned'" but must "violate some due process right guaranteed by the fourteenth amendment." Prantil v. California, 843 F.2d 314, 317 (9th Cir. 1988), quoting Cupp v. Naughten, 414 U.S. 141, 146, 94 S.Ct. 396 (1973). An erroneous reasonable doubt instruction can violate due process. Victor v. Nebraska, 511 U.S. 1, 5, 114 S.Ct. 1239 (1994). To satisfy the due process clause, the instruction must: (1) convey to the jury that it must consider only the evidence; and (2) properly state the government's burden of proof. Id. at 13.

Both the state and federal courts have universally rejected petitioner's claim that CALJIC 2.90 violates the due process right to conviction upon proof beyond a reasonable doubt. See Lisenbee v. Henry, 166 F.3d 997 (9th Cir. 1999); People v. Hearon, 72 Cal.App.4th 1285, 1287, 85 Cal.Rptr.2d 424 (1999). The California Court of Appeal's rejection of this claim was not contrary to or an unreasonable application of clearly established federal law. This claim is DENIED.

B. Lewd and Lascivious Conduct Conviction

The conviction under Cal. Penal Code § 288(c) arises out of an incident in September 1997, where petitioner touched the crotch area of a 15-year old girl, Sara C., while she was on horseback. (Answer at 5.) Petitioner makes three claims as to this conviction: (1) that the evidence was insufficient to support the conviction; (2) that the court erred in refusing his request for an instruction on the lesser-included offense of

battery; and (3) that the reasonable doubt instruction was constitutionally flawed. (Pet. at 5A, 5B, 5C, 6E.)

In challenging the sufficiency of the evidence, petitioner argues that there was insufficient evidence that he had the specific intent, as required by Cal. Penal Code § 288(a), to sexually gratify himself or Sara C. with the touching. (Id. at 5A.) In reviewing a claim of sufficiency of the evidence, the court must determine "whether, after reviewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S.Ct. 2781 (1979) (emphasis in original). The California Court of Appeal, applying the identical state standard, found that a rational trier of fact could have determined that petitioner had the requisite specific intent given that the record was devoid of any circumstances indicative of innocent touching. (Ct. App. at 7.) The determination of the state court of appeal was not contrary to or an unreasonable application of existing Supreme Court precedent, nor was it based on an unreasonable determination of the facts. This claim is DENIED.

Petitioner's second claim as to the lewd and lascivious conduct conviction is that he was entitled to an instruction on the lesser-included offense of battery. (Pet. at 5B, 5C.) The failure of a state court to instruct on lesser-included offenses in a non-capital case does not present a federal constitutional

question unless the failure to instruct interferes with the defendant's right to adequate instructions on his theory of defense. Windham v. Merkle, 163 F.3d 1092, 1106 (9th Cir. 1998); James v. Reese, 546 F.2d 325, 327 (1976); Bashor v. Risley, 730 F.2d 1228, 1240 (9th Cir. 1984). To state a claim under the Bashor exception, defendant's theory of the case must support the lesser-included offense instruction and there must be some evidence that only the lesser-included offense was committed. Solis v. Garcia, 219 F.3d 922, 928-30 (9th Cir. 2000). In rejecting petitioner's claim, the court of appeal found that there was no evidence of a non-sexual intentional touching that would support a battery instruction. (Ct. App. at 8.) This decision was not contrary to or an unreasonable application of established federal law. Nor was this an unreasonable determination of the facts, as petitioner's theory of the case was that the touching, if it occurred, was accidental. (Rep.'s Tr. at 66-, 71-72, 88-93, 104-08, 110-16, 152-59.) This claim is DENIED.

Finally, petitioner claims that the reasonable doubt instruction given in this case was constitutionally flawed. (Pet. at 6E.) The reasonable doubt instruction given was CALJIC 2.90, the same instruction given in the stalking case. For the reasons discussed above, this claim is DENIED.

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For the set forth above, the petition for a writ of habeas corpus is DENIED.

IT IS SO ORDERED.

Dated: 7/25/2005

DAVID F. LEVI
United States District Judge